Burgess, Incorporated *and* Truck Drivers Union, Local 170, a/w International Brotherhood of Teamsters, AFL–CIO. Cases 1–CA–29708 and 1–CA–29881

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

Upon a charge filed by the Union on September 9, 1992, and amended charges on September 23, 1992, and October 20, 1992, in Case 1–CA–29708, the General Counsel of the National Labor Relations Board issued a complaint against Burgess, Incorporated, the Respondent, alleging that it has violated Section 8(a)(3) and (1) of the National Labor Relations Act. Although properly served copies of the charge, amended charges, and complaint, the Respondent failed to file an answer.

Upon a charge filed by the Union on October 26, 1992, in Case 1–CA–29881, the General Counsel of the National Labor Relations Board issued a complaint against Burgess, Incorporated, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On March 4, 1993, the Regional Director issued an order consolidating Cases 1–CA–29708 and 1–CA–29881.

On April 8, 1993, the General Counsel filed a Motion for Summary Judgment with the Board. On April 9, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaints state that unless an answer is filed within 14 days of service, "all the allegations in the complaint shall be considered to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Regional Attorney, by letter dated December 2, 1992, notified the Respondent that unless an answer was received by December 9, 1992, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file timely answers, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Gardner, Massachusetts (Respondent's Gardner facility), has been engaged in the wholesale distribution and transportation of gravel, stone, and oil. During the calendar year ending December 31, 1991, Respondent, in conducting its business operations, sold and shipped from its Gardner facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Massachusetts. During this same calendar year, in conducting its business operations, Respondent performed services valued in excess of $50,000 in States other than the Commonwealth of Massachusetts, and received goods and materials valued in excess of $50,000 directly from points located outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On or about September 4, 1992, Respondent, at the Gardner facility, told employees that their continued employment was conditioned on their abandonment of the Union. On or about September 4, 1992, Respondent told employees that they were being discharged/laid off because they were Union. On or about September 4, 1992, Respondent told employees they were being discharged/laid off because of the Union's activities.

On or about September 4, 1992, Respondent discharged/laid off the employees named below:

Charles Berry
Brian Ledbetter
Ronald Roberti

because employees of Respondent joined or assisted the Union and they and their duly designated union representative engaged in concerted activities, and to discourage employees from engaging in these activities. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All truck drivers and mechanics employed by the Respondent at its Gardner, Massachusetts facility, but excluding all other employees, guards and supervisors as defined in the Act.

About February 1, 1991, Respondent, an employer engaged in the building and construction industry, granted recognition to the Union as the exclusive collective-bargaining representative of the unit by entering into a collective-bargaining agreement with the Union for the period February 1, 1991, to January 31, 1995, without regard to whether the majority status of the Union had ever been established under the provisions of Section 9 of the Act. For the period of February 1, 1991, through January 31, 1995, based on Section 9(a) of the Act, the Union has been the limited exclusive collective-bargaining representative of the unit.

Since about September 4, 1992, Respondent has failed to adhere to the terms and conditions of the agreement described above.

About September 4, 1992, Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

About September 4, 1992, Respondent, at the Gardner facility, bypassed the Union and dealt directly with unit employees Henry Morse and Wayne Morse by changing their form of pay from a wage to a commission and thus changing the terms and conditions of employment.

CONCLUSIONS OF LAW

1. By engaging in the conduct described above, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By laying off/discharging employees Charles Berry, Brian Ledbetter, and Ronald Roberti, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. By failing to adhere to the terms of the collective-bargaining agreement, by withdrawing recognition from the Union, and by bypassing the Union and dealing directly with employees, Respondent has been failing and refusing to bargain collectively and in good faith with the limited exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(5) and (1) of the Act.

4. Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition and failing to abide by the collective-bargaining agreement, we shall order the Respondent to recognize the Union as the limited exclusive collective-bargaining agent of its unit employees and to abide by that agreement, and to make whole the unit employees for any losses resulting from its failure to do so, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), and *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), including any additional amounts applicable to delinquent fringe benefit payments as determined in accordance with the criteria set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to offer the discriminatees immediate and full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earning and other benefits suffered as a result of the discrimination against them, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, supra. The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges, and to notify the discriminatees in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Burgess, Incorporated, Gardner, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that their continued employment is conditioned on their abandonment of the Union.

(b) Telling employees that they are being discharged/laid off because they are Union.

(c) Telling employees they are being discharged/laid off because of the Union's activities.

(d) Discharging or laying off employees because they join or assist the Union or because they and their duly designated union representative engage in concerted activities, or to discourage employees from engaging in these activities.

(e) Withdrawing recognition from the Union as the limited exclusive collective-bargaining representative of the unit. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All truck drivers and mechanics employed by the Respondent at its Gardner, Massachusetts facility, but excluding all other employees, guards and supervisors as defined in the Act.

(f) Failing to adhere to the terms and conditions of the agreement with the Union which is effective for the period from February 1, 1991, to January 31, 1995.

(g) Bypassing the Union and dealing directly with unit employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the employees listed below immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

Charles Berry
Brian Ledbetter
Ronald Roberti

(b) Expunge from its files any and all references to the unlawful discharge of the above employees, and notify said employees, in writing, that this has been done.

(c) On request, recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

(d) Adhere to the terms and conditions of the collective-bargaining agreement with the Union which is effective for the period from February 1, 1991, to January 31, 1995.

(e) Make unit employees, including Henry Morse and Wayne Morse, whole, in the manner set forth in the remedy section of the decision, for any loss of wages or benefits or other expenses suffered as a result of the Respondent's failure to adhere to the terms of the collective-bargaining agreement.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Gardner, Massachusetts, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 13, 1993

James M. Stephens, Chairman

Clifford R. Oviatt, Jr., Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell employees that their continued employment is conditioned on their abandonment of the Union.

WE WILL NOT tell employees that they are being discharged/laid off because they are Union.

WE WILL NOT tell employees they are being discharged/laid off because of the Union's activities.

WE WILL NOT discharge or lay off our employees because they join or assist the Union or because they or their duly designated union representative engage in concerted activities, or to discourage employees from engaging in these activities.

WE WILL NOT withdraw recognition from the Union as the limited exclusive collective-bargaining representative of the unit. The following employees constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

All truck drivers and mechanics employed by us [Respondent] at our Gardner, Massachusetts facility, but excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT fail to adhere to the terms and conditions of the agreement with the Union which is effective for the period from February 1, 1991, to January 31, 1995.

WE WILL NOT bypass the Union and deal directly with unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer the employees listed below immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earning and other benefits suffered as a result of the discrimination against them, with interest:

Charles Berry
Brian Ledbetter
Ronald Roberti

WE WILL notify each of the above employees that we have removed from our files any reference to their discharges or layoffs and that we will not use the discharges or layoffs against them in any way.

WE WILL on request, recognize and bargain in good faith with the Union as the limited exclusive collective-bargaining representative of the unit employees with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment.

WE WILL adhere to the terms and conditions of the collective-bargaining agreement with the Union which is effective for the period from February 1, 1991, to January 31, 1995.

WE WILL make unit employees, including Henry Morse and Wayne Morse, whole, with interest, for any loss of wages or benefits or other expenses suffered as a result of our failure to adhere to the terms of the collective-bargaining agreement.

BURGESS, INCORPORATED

311 NLRB No. 1

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CORRECTION

Pursuant to a Supplemental Notice to Show Cause which issued on August 20, 1993, in which no responses were filed, please substitute the attached Decision and Order which reflects modifications of 311 NLRB No. 1. The modifications are in the Board's Order, paragraphs 2(d) and (e).

Dated: October 7, 1993